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No. 86-113

In the Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN BAPTIST CHURCHES IN THE U.S.A., ET AL.,
PETITIONERS

v.

RONALD W. REAGAN, PRESIDENT OF THE
UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that petitioners were without standing to challenge the President's decisions to establish diplomatic relations with and to appoint an ambassador to the Holy See.

2. Whether the court of appeals erred in its alternative holding that in any event petitioners' challenge to the President's decisions presents a nonjusticiable political question.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 786 F.2d 195. The opinion of the district court (Pet. App. 21a-29a) is reported at 607 F. Supp. 747.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17a-19a) was entered on March 21, 1986. A petition for rehearing and suggestion for rehearing en banc was denied on April 25, 1986 (Pet. App. 20a). The

petition for a writ of certiorari was filed on July 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The State of Vatican City is an area of 109 acres within the City of Rome. The Pope of the Roman Catholic Church is the spiritual sovereign of this city-state. See 22 Encyclopaedia Britannica 905 (1971). The Holy See, a component of the Roman Catholic Church heirarchy, is the territorial sovereign or government of that state. See J. Crawford, *The Creation of States in International Law* 156-159 (1979). In that sovereign capacity, the Holy See "occupies a recognized position in international law" (*Ponce* v. *Roman Catholic Church*, 210 U.S. 296, 318 (1908)) and, accordingly, conducts diplomatic relations with more than 80 foreign countries and sends representatives to various international organizations, including the United Nations. See II *The Europa Year Book* 2953 (1986); *Restatement of Foreign Relations Law of the United States* § 201, reporter's notes ¶ 7 (Tent. Draft No. 2, 1981).

The United States first established consular relations with the Holy See in 1797. In 1848, it formalized the two governments' relationship and, from 1848 to 1867, sent four official emissaries, all confirmed by the Senate, to serve there. See *Nomination of William A. Wilson to be Ambassador to the Holy See: Hearing before the Senate Foreign Relations Comm.*, 98th Cong., 2d Sess. 16 (1984). Formal diplomatic relations between the United States and the Holy See were severed in 1867 (see Pet. App. 6a, 23a), and the two governments did not exchange any further representatives until 1939, when President

Roosevelt and Pope Pius XII informally reestablished relations. See R. Graham, *Vatican Diplomacy* 326 (1959). Over the next forty years, various Presidents appointed personal envoys to the Holy See. Recent Developments, 25 Harv. Int'l L. J. 441, 443-444 (1984). In 1984, after Congress cleared the path by way of legislation (Act of Nov. 22, 1983, Pub. L. No. 98-164, § 134, 97 Stat. 1029), President Reagan exchanged formal diplomatic notes with the Holy See and nominated William A. Wilson to be the United States' Ambassador to that government. See 130 Cong. Rec. S2390 (daily ed. Mar. 7, 1984) (confirming Mr. Wilson's appointment).

2. Petitioners are the umbrella organizations for various religious groups. See Pet. 4. In November 1984, they filed this action in the United States District Court for the Eastern District of Pennsylvania, challenging the President's decision to reestablish diplomatic relations with the Holy See. Petitioners claimed that the President's actions violated their rights under the First and Fifth Amendments of the Constitution. See Pet. App. 66a-68a. The district court dismissed their complaint (*id.* at 30a). It found that petitioners had "tried valiantly to identify particularized injury-in-fact * * *, but [that] the effort ha[d] failed" (*id.* at 25a). The court accordingly held that petitioners "lack[ed] standing to pursue" their challenge to the President's decisions (*id.* at 26a). Alternatively, the court held that, even if petitioners had standing to sue, the political question doctrine would bar it from reviewing the President's decision to accord diplomatic recognition to a particular foreign state (*id.* at 26a-28).

The court of appeals unanimously affirmed the dismissal of petitioners' complaint (Pet. App. 1a-16a).

On the standing issue, the court rejected petitioners' attempt to establish their standing as "taxpayers," as "citizens," or as "religious adherents" (*id.* at 9a-14a). The court held that petitioners lacked standing to sue as "taxpayers" because they did not challenge an expenditure under the Spending Clause (U.S. Const. Art. I, § 8, Cl. 1) and thus did not fall within the narrow exception to the general rule against "taxpayer standing" that this Court has recognized. Pet. App. 9a-11a (discussing *Frothingham* v. *Mellon*, 262 U.S. 447 (1923), *Flast* v. *Cohen*, 392 U.S. 83 (1968), and *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982)). The court further held that petitioners lacked standing to sue as "citizens" attempting to vindicate Establishment Clause values, noting that this Court "has consistently rejected claims of citizen standing predicated upon the right, possessed by every citizen, to require that the government be administered in accordance with the Constitution" (Pet. App. 12a, citing *Allen* v. *Wright*, 468 U.S. 737 (1984)). And, finally, the court held that petitioners lacked standing to sue as "religious adherents," since petitioners had not alleged with sufficient specificity how, if at all, they were "direct[ly] and palpabl[y]" disadvantaged by the Holy See's official diplomatic status or, in any event, how any disadvantages petitioners suffered were attributable to the President's actions, as opposed to the Vatican's unique status as a territorial sovereignty controlled by the heirarchy of a particular church (Pet. App. 8a, 12a-14a).

Alternatively, assuming *arguendo* that petitioners had standing to sue, the court of appeals held that they could not overcome "the hurdle of justiciability"

(Pet. App. 14a). The court pointed out that petitioners' complaint "c[ould] only be read as a request for judicial review of the President's decision to extend diplomatic relations to the Vatican" (*ibid.*). In that light, the court noted the well-settled principle that the establishment of diplomatic relations is a matter that "the Constitution commits exclusively to the Executive Branch" and, accordingly, held that the President's action in recognizing the State of Vatican City was "a judicially unreviewable political decision" (*id.* at 15a).

ARGUMENT

The decision below is correct. Petitioners do not allege (nor is there) a conflict among the circuits on the question presented. There is no basis for further review.

1. Petitioners first challenge the court of appeals' holding that they were without standing to contest the President's decision to reestablish diplomatic relations with the Holy See (Pet. 5-16). Petitioners seem to accept the court's premise that, to establish their standing, they had to allege an "injury in fact" that had a "causal connection between them and the challenged governmental action" (Pet. App. 12a). But petitioners take issue with the court's conclusion that the injuries they alleged either were too "generalized" to satisfy the injury-in-fact requirement (*id.* at 13a) or were not causally connected to the President's decision to recognize the State of Vatican City (*id.* at 13a-14a). Petitioners' arguments are meritless.

Petitioners' allegation that the reestablishment of diplomatic relations with the Holy See denies them equal "access" to the United States Government (see

Pet. 10) simply does not state a judicially cognizable "injury in fact." The Constitution does not give petitioners any right of "access" to the Government. "Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." *Minnesota State Board for Community Colleges* v. *Knight*, 465 U.S. 271, 285 (1984). Unless the government creates a "public forum" for discussing particular subjects (*Madison Joint School Dist.* v. *Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175 (1976)), members of the public have no right to complain that government officials have opted to "meet and confer" with other individuals or groups. See *Smith* v. *Arkansas State Highway Employees*, 441 U.S. 463, 464-466 (1979); cf. *Cornelius* v. *NAACP Legal Defense & Educational Fund, Inc.*, No. 84-312 (July 2, 1985), slip op. 10. And, even if the denial of "access" could create a judicially cognizable injury, petitioners still would not have standing. They have not alleged that they have ever sought and been denied such "access" in circumstances where the ambassador from the Holy See was granted access because of his official diplomatic status. Cf. *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 166-167 (1972). Thus, petitioners have not alleged that they have been "personally denied equal treatment solely because of their membership in a disfavored group" (*Heckler* v. *Mathews*, 465 U.S. 728, 740 (1984)).

Petitioners' allegation (Pet. 10-11) that the effect of the President's reestablishment of diplomatic relations with the Holy See "is to confer the imprimatur of state approval on one particular church to the

exclusion of all others" is equally incompetent to establish a judicially cognizable injury. This Court has flatly rejected the idea that "abstract stigmatic injur[ies]" can provide the injury in fact that is a condition precedent to standing. See *Allen* v. *Wright*, 468 U.S. 737, 755-756 (1984) (denying standing to parents of black school children who claimed that they suffered stigmatic injury because of federal tax exemptions granted to allegedly discriminatory private schools); *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 482-487 (1982) (denying standing to organization dedicated to separation of church and state which claimed that it suffered stigmatic injury from the government's conveyance of property to a church-related college). To be sure, the Court has indicated that, where individuals " 'are personally denied equal treatment' by the challenged discriminatory conduct," an allegation of stigmatic injury may suffice (*Allen* v. *Wright*, 468 U.S. at 755, quoting *Heckler* v. *Mathews*, 465 U.S. 728, 740 (1984)). But petitioners have not alleged that they have been personally denied any benefit or privilege, or that they they have personally suffered any disadvantage, in consequence of the President's decision to accord diplomatic recognition to the Vatican. Petitioners' claims of "stigmatic injury" are thus of the generalized and abstract sort that do not satisfy the "injury in fact" requirement of standing doctrine. See *Allen* v. *Wright*, 468 U.S. at 755, 757 n. 22.[1]

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[1] Petitioners attempt to characterize the court of appeals' decision as holding that stigma arising from unequal treatment under the Establishment Clause can never satisfy the injury-in-fact requirement. See Pet. 8-9, 12. Petitioners mis-

As an alternative ground on which to predicate their standing, petitioners alleged in their complaint that the President's establishment of diplomatic relations with the Holy See expressed " 'the actual or symbolic preference * * * for one church,' " a preference that assertably " 'enhances the ability of [the Roman Catholic Church] to compete in the religious marketplace, with a corresponding loss of public attention, acceptance, membership and * * * revenue to [petitioners'] churches' " (Pet. 10, quoting Pet. App. 64a). But this allegation is likewise incompetent to establish injury in fact. Petitioners have not alleged that any of their religious organizations "has sustained or is immediately in danger of sustaining" any of these adverse consequences. *Ex parte Levitt*, 302 U.S. 633, 634 (1937). See also *Los Angeles* v. *Lyons*, 461 U.S. 95, 101-102 (1983). Petitioners' allegations, rather, "take[] us into the area of speculation and conjecture" (*O'Shea* v. *Littleton*, 414 U.S. 488, 497 (1974)), and "[s]uch speculation is insufficient to establish the existence of a present, live controversy" (*Ashcroft* v. *Mattis*, 431 U.S. 171, 173 n.2 (1977)). And even if petitioners had specifically alleged an actual loss of revenue or membership, such alleged consequences could not "fairly * * * be traced to the challenged action of the de-

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read the court of appeals' decision. That court recognized that such claims may sometimes confer standing, but correctly held that standing is available "only to 'those persons who are personally denied equal treatment by the challenged discriminatory conduct' " (Pet. App. 14a, quoting *Allen* v. *Wright*, 468 U.S. at 755). Accord, *e.g.*, *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. at 486. Since petitioners do not make any concrete allegations that they personally have been treated unequally, they do not allege a sufficient injury in fact.

fendant." *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41 (1976). Such declines in membership or revenue could be attributable to myriad social, cultural, economic, and demographic factors (see *Allen* v. *Wright*, 468 U.S. at 758-759), and any connection between petitioners' alleged harms and the President's actions would be "attenuated at best" (*id.* at 757). Thus, the disadvantages that petitioners allegedly suffer simply do not satisfy the requirements of this Court's standing decisions.

In any event, as the court of appeals recognized (Pet. App. 13a-14a), the unequal treatment about which petitioners complain is not "likely to be redressed by the requested relief" (*Allen* v. *Wright*, 468 U.S. at 751). Petitioners' grievance at bottom stems from the fact that the State of Vatican City, unlike most other governments, is a territorial sovereignty controlled by the authorities of a single religion. As the court of appeals pointed out, "the Roman Catholic Church's unique position of control of a sovereign territory [may] give[] it certain advantages that other religious organizations do not enjoy" (Pet. App. 8a). Officials of the Holy See and the United States Government conferred frequently between 1939 and 1984, when various Presidents sent personal envoys to the Vatican. See pages 2-3, *supra*. And officials of the Holy See and the United States Government would undoubtedly have continued to confer regardless of whether or not the President decided to exchange diplomatic notes with the Vatican. To guarantee petitioners the "equal access" to Executive Branch officials that they demand, the federal courts would have to become "continuing monitors of * * * Executive action." *Laird* v. *Tatum*, 408 U.S. 1, 15 (1972). The separation-of-powers

concerns that underlie the standing doctrine bar them from doing so. Accord, *Allen* v. *Wright*, 468 U.S. at 761; *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974); *United States* v. *Richardson*, 418 U.S. 166 (1974).[2]

2. Petitioners next contend (Pet. 17-21) that the court of appeals erred in its alternative holding that their challenge to the President's decisions presents a nonjusticiable political question. Their contention is without merit. Even if petitioners were thought to have standing to sue, the political question doctrine would require dismissal of their complaint.

The Constitution vests all authority concerning the recognition of foreign states and their governments,

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[2] Petitioners err (Pet. 13) in citing *Baker* v. *Carr*, 369 U.S. 186 (1962), to buttress their standing argument. There, plaintiffs alleged " 'a plain, direct * * * interest in maintaining the effectiveness of their votes' " (369 U.S. at 208, quoting *Coleman* v. *Miller*, 307 U.S. 433, 438 (1939)), an interest that this Court has long recognized as supporting "a legally cognizable injury." *Baker* v. *Carr*, 369 U.S. at 208. Here, by contrast, petitioners have failed to allege "any personal injury suffered by them as a consequence of the alleged constitutional error." *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. at 485 (emphasis deleted).

Although petitioners do not contend that there exists a conflict among the circuits on the standing question presented here, they do assert (Pet. 6) that this Court's standing decisions have bred "confusion" in the lower courts. This assertion, which petitioners do not support with citation of any lower-court opinions, is insubstantial, as a review of recent decisions shows. See, *e.g.*, *ACLU* v. *City of St. Charles*, 794 F.2d 265, 268-269 (7th Cir. 1986); *Hawley* v. *City of Cleveland*, 773 F.2d 736, 739-740 (6th Cir. 1985), cert. denied, No. 85-1168 (Mar. 3, 1986); *Bell* v. *Little Axe Independent School Dist. No. 70*, 766 F.2d 1391, 1398 (10th Cir. 1985); *ACLU* v. *Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1103-1108 (11th Cir. 1983).

and the nature of diplomatic relations to be conducted with those governments, in the President. U.S. Const. Art. II, § 2, Cl. 2, § 3; see *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 410-411 (1964); *United States* v. *Pink*, 315 U.S. 203, 229-230 (1942); *United States* v. *Belmont*, 301 U.S. 324, 329-330 (1937); *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918). The President's "action in recognizing a foreign government and in receiving its diplomatic representatives is conclusive on all domestic courts" (*Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 138 (1938)). This Court's "cases firmly establish that the Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes" (*Goldwater* v. *Carter*, 444 U.S. 996, 1007 (1979) (Brennan, J., dissenting)). Since petitioners' "complaint can only be read as a request for judicial review of the President's decision to extend diplomatic relations to the Vatican" (Pet. App. 14a), the court of appeals correctly held that their challenge involves a matter "that the Constitution commits exclusively to the Executive Branch" (*id.* at 15a).

Petitioners seem to agree (Pet. 10) that the State of Vatican City is a "territorial sovereignty" and that foreign states can and do conduct diplomatic relations with it. Petitioners assert, however, that the United States succeeded in establishing diplomatic relations only "with the Catholic Church, to wit: the Holy See and not the territorial sovereignty of the State of Vatican City" (*ibid.*). Petitioners contend that their characterization of the Holy See as a purely religious body, rather than as a governmental authority, is "the basic allegation on which [their] entire case is premised," and they say that "this

allegation must be accepted as true" for purposes of ruling on the motion to dismiss (*ibid.*).

Petitioners' contention misses the point by a wide margin. The point of the political question doctrine, as it applies to this case, is that courts may not second-guess the President's decision *either* that a particular foreign nation is entitled to diplomatic recognition *or* that a particular entity or government is the proper representative of that nation for diplomatic purposes. "What government is to be regarded here as representative of a foreign sovereign state," this Court has held, "is a political rather than a judicial question." *Guaranty Trust Co.* v. *United States*, 304 U.S. at 137. Accord, *United States* v. *Pink*, 315 U.S. at 229. The question of "who is the sovereign of a territory is not a judicial question, but one the determination of which by the political departments conclusively binds the courts." *United States* v. *Belmont*, 301 U.S. at 328. Accord, *United States* v. *Pink*, 315 U.S. at 229. The political question doctrine thus would prohibit a district court from reviewing the President's decision that the Holy See is the "government" of the territorial sovereignty of the State of Vatican City. Petitioners plainly cannot finesse that prohibition by seeking to characterize their views of the Holy See as a factual allegation which "must be accepted as true" (Pet. 10). Since the political question doctrine would preclude the district court from *investigating* the truth of petitioners' allegation, that allegation cannot and need not be "accepted as true" for purposes of ruling on the motion to dismiss.[3]

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[3] Petitioners' assertion (Pet. 18) that the Holy See considers the United States to have established diplomatic relations

3. The only other court that has addressed a challenge to the President's decision to establish diplomatic relations with, and appoint an ambassador to, the Holy See also dismissed the plaintiffs' complaint on the basis of standing and the political question doctrine. *Phelps* v. *Reagan*, No. 84-4015 (D. Kan. July 22, 1985), appeal pending, No. 85-2279 (10th Cir.). Absent a conflict in the circuits on this question, which petitioners concede is "undeniably unique" (Pet. 5), review is plainly unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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with the Roman Catholic Church is irrelevant. The relevant question does not relate to the Holy See's views, but to the President's views concerning the diplomatic relations that he has established. See *United States* v. *Pink*, 315 U.S. at 229-230; *United States* v. *Belmont*, 301 U.S. at 328. In reestablishing diplomatic relations with the Holy See, the President clearly viewed the Holy See as a government, and not as an exclusively religious authority, and that determination "conclusively binds the courts" (*ibid.*). See L. Henkin, *International Law Cases and Materials* 207-208 (1980).

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